

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-600

YAKIMA INTERURBAN LINES ASSOCIATION—
ADVERSE ABANDONMENT—IN YAKIMA COUNTY, WA

Decided: September 15, 2005

This decision denies a petition to reconsider and clarify a decision in this proceeding served on November 19, 2004 (November Decision).

BACKGROUND

The Naches Line (Line) is located in Yakima County, WA, and is owned by Yakima Interurban Lines Association (YILA), a Washington State non-profit corporation. The Line was acquired by The Burlington Northern and Santa Fe Railway Company (BNSF)¹ in 1996 and taken out of service due to poor track conditions in 1997. In 1999, YILA acquired 11.29 miles of the Line, from milepost 2.97 at Fruitvale, WA, to milepost 14.26 at Naches, WA. The State of Washington, through the Washington State Department of Transportation (WSDOT), subsequently loaned YILA \$516,000 to rehabilitate the Line, but the latter failed to carry out the rehabilitation and defaulted on the loan.

On January 27, 2004, Kershaw Sunnyside Ranches, Inc. (Kershaw or petitioner) filed an adverse abandonment application under 49 U.S.C. 10903, asking us to withdraw our primary jurisdiction in order to permit it to proceed to state court to obtain control of the portion of the Line that crosses its property. Kershaw argued that the Line has not been used in years, is in serious disrepair, and is a hazard and an eyesore. Protests were filed jointly by Yakima County, the City of Yakima, the Town of Naches, and YILA (Rail Commenters), and individually by Level 3 Communications, L.L.C. (Level 3), WSDOT, and BNSF. Kershaw filed a reply.

In the November Decision, we denied Kershaw's application. We noted that, although the Line is not currently being operated, local governments and shippers, a potential replacement rail carrier, WSDOT, and BNSF opposed abandonment, and that Rail Commenters had presented feasible plans for rehabilitation of the Line and restoration of rail service. We relied on City of Colorado Springs—Petition for

¹ Effective January 20, 2005, the name of this rail carrier was changed to "BNSF Railway Company."

Declaratory Order—Abandonment Determination, Finance Docket Nos. 31271 and 31230 (ICC served Mar. 22, 1989) (Colorado Springs), where the agency denied a request for adverse abandonment authority for a line because efforts were made to solicit traffic, the carrier had demonstrated an interest in preserving the line, and substantial public funding had been committed toward preserving the rail corridor of which the line was a part. We also noted that our finding was without prejudice to Kershaw's seeking to reopen or file a new adverse abandonment application, should the proposed rehabilitation and restoration not occur within a reasonable time.

On December 27, 2004, Kershaw filed a petition for reconsideration and clarification of the November Decision, which we will treat as a petition to reopen under 49 CFR 1152.25(e).² Kershaw asserts that the Board erred in finding that, under 49 U.S.C. 10903(d), the public convenience and necessity (PC&N) does not require abandonment because no "carrier" has expressed a desire to continue operations and taken reasonable steps to acquire traffic. Kershaw argues that it was material error for the Board to rely on Colorado Springs and that the November Decision conflicts with CSX and CSX Transportation—Adverse Abandonment—Canadian National Railway Company and Grand Trunk Western Railroad Inc., STB Docket No. AB-31 (Sub-No. 38) (STB served Feb. 1, 2002) (CSXT), where the Board granted an application for adverse abandonment. Kershaw also seeks clarification as to what constitutes a reasonable time for Yakima County to acquire and rehabilitate the Line, and asks the Board to now impose a specific time frame for such actions.

Rail Commenters and Level 3 separately replied on January 18, 2005. Rail Commenters contend that the Board's November Decision did not contain material error and was consistent with precedent. They point out that WSDOT has already invested over \$500,000 in efforts to rehabilitate the line and that Yakima County has recently received four bids to lease and operate another rail line owned by the county. This, they contend, demonstrates a motivation and ability to rehabilitate and operate the Naches Line, and shows that doing so would be feasible. Rail Commenters also maintain that setting time deadlines would encourage further litigation and frustrate attempts to reactivate rail service. They argue that Kershaw's various lawsuits and challenges at the Board are the primary cause for delay thus far in repairing and reinstituting service on the Naches Line. Level 3 argues that Kershaw's request is contrary to the Board's regulations and fails to make a sufficient showing to reopen the proceeding. Level 3 requests sanctions against Kershaw for filing an improper petition.

² The Board's rules do not provide for petitions for reconsideration of entire Board decisions in abandonment proceedings, see 49 CFR 1152.25(e)(2), but petitions to reopen are allowed. See 49 CFR 1152.25(e)(4). The same standards apply to both types of petitions.

DISCUSSION AND CONCLUSIONS

A petition to reopen will be granted only upon a showing that the action would be materially affected by new evidence, changed circumstances, or material error. 49 U.S.C. 722(c); 49 CFR 1152.25(e)(2)(ii) and (4).

The November Decision did not materially err in finding that the PC&N do not require or permit the granting of Kershaw's adverse abandonment application. There is realistic potential for continued rail service over the Naches Line, as demonstrated by shipper interest in renewed service on the Line, a carrier's expression of interest in operating the Line, and local governments' efforts to rehabilitate and restore service over the Line. Kershaw has not provided evidence that those findings were in error. To the contrary, evidence provided by Rail Commenters bolsters our finding that there is real potential for resumed rail service.

Kershaw argues that the focus of the PC&N test in the context of an adverse abandonment application is whether the incumbent carrier on a line has expressed a desire to continue operations and has taken steps to attract traffic. It argues that YILA was never a rail carrier, and that none of the other protestants may be considered the incumbent carrier either. Thus, it claims that there is no basis for denying an adverse abandonment application here. We do not agree. The purpose of the PC&N test is to determine whether the abandonment would be in the public interest. This standard is not as narrowly drawn as Kershaw suggests.

True, YILA has not provided service over the Line, due to its failure as an operator and its default on its WSDOT loan. See November Decision at 2, 5. But there is still a common carrier responsibility to provide service over the Line, reflected in YILA's exercise of the Board's authorization for YILA to acquire the Line in 1999. See Yakima Interurban Lines Association—Acquisition Exemption—BNSF Acquisition, Inc., STB Finance Docket No. 33719 (STB served Mar. 4, 1999). Moreover, the local governments that have demonstrated their willingness and ability to restore common carrier service, and shippers along the right-of-way have indicated their interest in using rail service if it were again available over the Line. Kershaw's argument that local governments may not demonstrate the potential for renewed service because they are not the incumbent carrier on the Line elevates form over substance. The purpose of our jurisdiction over abandonments is to protect the public from an unnecessary discontinuance, interruption, or obstruction of rail service. Granting Kershaw's petition where, as here, there are feasible plans to continue rail service would be contrary to this goal.

The cases cited by Kershaw do not support reopening this proceeding. Kershaw seeks to distinguish Colorado Springs by arguing that the carrier itself had pledged to repair its line, had already received a grant of public funds for repairs, and had made efforts to solicit traffic. While some of the facts underlying Colorado Springs differ from those here, both cases involve third-party efforts to force an abandonment over a line that was not then active, but where this agency found real potential for reactivation of service.

Therefore, the agency found that abandonment could adversely affect shippers. Accordingly, the agency found that the third-party applicant failed to sustain its burden of demonstrating that the PC&N required or permitted abandonment.

Kershaw argues that this case is more similar to CSXT, in which the Board granted an application filed by a carrier seeking adverse abandonment of a portion of another carrier's line that had not been used for approximately 6 years so that it could use the tracks to improve rail service in Chicago, IL. But in that case, CSXT, a rail carrier that owned the real estate underlying the other carrier's rail line, proposed to use the line itself for rail service. The Board found that, by granting CSXT's application, no shippers would lose routing options and, indeed, that improved rail service would result. Here, Yakima County is seeking to acquire the Line, presumably by sale, to resume service. Granting Kershaw's application would prevent renewed rail service on the Line, rather than improve service. Thus, CSXT is inapposite.

In the November Decision, we noted that Kershaw had legitimate concerns regarding the upkeep of the property at issue. We noted that our decision was without prejudice to Kershaw's seeking to reopen or to file a new adverse abandonment application if the proposed rehabilitation and restoration of service did not occur within a reasonable time. Our PC&N finding was not (and is not) intended to be a shield to hold this Line open indefinitely without a resumption of rail service. A significant delay and a demonstrated lack of progress could be evidence of changed circumstances warranting a grant of adverse abandonment authority.

In our prior decision, however, we did not impose a time limit that required rehabilitation or renewed service by a certain date, and we will not do so here. The burden to demonstrate changed circumstances is on Kershaw. It is in a position to monitor the progress (or lack thereof) toward restoring rail service and, if appropriate, demonstrate that circumstances have changed and that the state and local government are no longer continuing to proceed to undertake the Line's restoration.

Finally, Level 3 has asked that the Board sanction Kershaw, but has provided no basis for such action. The request for sanctions will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Kershaw's petition is denied.
2. Level 3's request for sanctions is denied.

3. This decision is effective on the date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary